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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL R. FOSTER,

Defendant and Appellant.

F063186

(Super. Ct. Nos. CRF23423, CRF30143,
CRF25857)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J., and Detjen, J.

In Tuolumne County case No. CRF30143 (case No. CRF30143) appellant, Daniel R. Foster, pled guilty to being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1))¹ and admitted three prior prison term enhancements (§ 667.5, subd. (b)) and an allegation that he had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)). In Tuolumne County case No. CRF32423 (case No. CRF32423) Foster pled guilty to failing to appear while released on his own recognizance (§ 1320, subd. (b)) and admitted a prior strike conviction.

In Stanislaus County case No. 1406232 (case No. 1406232) appellant was convicted by plea of auto theft (Veh. Code, § 10851, subd. (a)), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), operating a chop shop (Veh. Code, § 10801), and theft of services (§ 498, subd. (d)). Foster also admitted an allegation in case No. 1406232 that he had a prior conviction within the meaning of the three strikes law.

On December 29, 2010, the court sentenced Foster to an aggregate term of 11 years in all three cases.

Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we modify Foster's award of presentence credits in case Nos. CRF30143 and 1406232. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORY²

On October 28, 2007, California Highway Patrol Officer Paul Mote was parked in the center median of Highway 120 monitoring traffic for speed violations when Foster passed his location in a black Honda travelling approximately 100 miles an hour. Officer

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts of Foster's offenses are limited to those underlying his offenses in case Nos. CRF30143 and CRF32423.

Mote followed Foster and caught up to him down the road where the car crashed and landed down an embankment in the highway median. Foster quickly exited the car and began charging back up the embankment to the officer's location. Mote exited his patrol car, pointed his gun at Foster and ordered him to lie on the ground. Foster complied and Mote handcuffed him and sat him on a curb. After determining that Foster's license was expired, Mote decided to impound Foster's car. While he was doing an inventory search of the car, Mote found .38-caliber ammunition under the front passenger's seat. Foster was cited and released that day.

After Mote left the scene with Foster, a tow truck driver who had arrived on the scene found a loaded .38-caliber revolver in the area that Officer Mote had seen Foster climb from (case No. CRF30143).

Foster was on parole when he was involved in the above incident. On November 19, 2007, Foster signed an Optional Waiver form and received a 12-month parole term for several parole violations, including possessing a firearm and ammunition, failing to register as a drug user, and possession of a knife with a blade longer than two inches.

On December 21, 2007, a complaint in Tuolumne County case No. CRF25857 was filed charging Foster with possession of a firearm by a felon (count 1), possession of ammunition by a felon (count 2), misdemeanor driving while his driving privilege was revoked with a prior conviction (count 3), three prior prison term enhancements and an allegation that appellant had a prior conviction within the meaning of the three strikes law.

On December 12, 2008, Foster was arrested in Stanislaus County on some unrelated charges. His parole was violated a second time and he was not released from custody on the parole violation until April 2009. As a result of his incarceration on this

new parole violation, on January 7, 2009, Foster failed to appear for a hearing in case No. CRF25857.

Following a preliminary hearing on May 1, 2009, the court held Foster to answer on counts 2 and 3 and it deemed the complaint in case No. CRF25857 to be an information as to those counts.

On July 6, 2009, the district attorney dismissed the information in case No. CRF25857 and filed a complaint in case No. CRF30143 which charged Foster with possession of a firearm by a felon (count 1), possession of ammunition by a felon (count 2/§ 12316, subd. (b)(1)), and misdemeanor driving while his driving privilege was revoked with a prior conviction (count 3/Veh. Code, § 14601.1, subd. (a)). The complaint also alleged three prior prison term enhancements and that Foster had a prior conviction within the meaning of the three strikes law. Additionally, the court exonerated Foster's bail in case No. CRF25857 and allowed him out of custody on his own recognizance in case No. CRF30143.

On August 7, 2009, Foster failed to appear for a preliminary hearing in case No. CRF30143 and a warrant for his arrest issued (Tuolumne County case No. CRF30653).

On March 17, 2010, Foster was back in custody.

On March 18, 2010, the court released Foster on his own recognizance in case Nos. CRF30143 and CRF30653 and ordered him to return to court on April 7, 2010, for a preliminary hearing.

On April 7, 2010, Foster failed to appear and the court issued a warrant for his arrest (case No. CRF32423).

On May 11, 2010, the district attorney filed a complaint in case No. CRF32423 charging Foster with failing to appear in case No. CRF30143 on April 7, 2010, while released on his own recognizance (count 1) and failing to appear in case No. CRF30653 on the same date while released on his own recognizance (count 2). The complaint also

alleged an on-bail enhancement (§ 12022.1), three prior prison term enhancements and that Foster had a prior conviction within the meaning of the three strikes law.

On June 7, 2010, in Stanislaus County Superior Court, Foster entered his plea in case No. 1406232 and was sentenced to an aggregate term of five years four months.

On September 10, 2010, after Foster waived a preliminary hearing in case Nos. CRF30143 and CRF32423, the court ordered him to answer to the charges in the complaint in each case and each complaint was deemed to be an information.

On October 25, 2010, the court heard and denied Foster's *Marsden* motion.

On November 22, 2010, the prosecutor dismissed case No. CRF30653.

On December 1, 2010, Foster entered his plea in case Nos. CRF30143 and CRF32423 and waived his right to appeal in both cases in exchange for a stipulated, aggregate term of eight years four months in case Nos. CRF30143 and CRF32423 and a consecutive, aggregate term of two years eight months in case No. 1406232.

On December 29, 2010, the court sentenced Foster to an aggregate 11-year term in the three cases as follows: the middle term of two years on his felon in possession of a firearm conviction in case No. CRF30143, doubled to four years because of Foster's prior strike conviction, a consecutive 16-month term for his failure to appear conviction in case No. CRF32423 (one-third the middle term of two years doubled to 16 months because of Foster's prior strike conviction), a consecutive 16-month term on his auto theft conviction in case No. 1406232 (one-third the middle term of two years doubled to 16 months because of Foster's prior strike conviction), a consecutive 16-month term on his possession of a controlled substance conviction in case No. 1406232 (one-third the middle term of two years doubled to 16 months because of Foster's strike conviction), a concurrent middle term of two years on his operating a chop shop conviction in case No. 1406232 and a concurrent middle term of two years on Foster's theft of services

conviction in case No. 1406232, and three consecutive one-year prior prison term enhancements in case No. CRF30143.

Foster's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*Wende, supra*, 25 Cal.3d 436.) However, in a supplemental brief filed on January 19, 2012, Foster appears to contend that he was entitled to credit in case No. CRF30143 for the approximately one year he spent in custody after his parole was revoked in 2007, he did not receive a hearing before his parole was revoked, and his defense counsel provided ineffective representation through his failure to file a motion to suppress a knife that was found in the master bedroom closet of the house belonging to his roommate. There is no merit to any of these contentions.

“As the Supreme Court explained in *People v. Bruner* (1995) 9 Cal.4th 1178, 1191 [40 Cal.Rptr.2d 534, 892 P.2d 1277], ‘[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period.’ Defendant’s sentence may not be credited with presentence custody time attributable to a parole or probation revocation based in part upon *different* criminal conduct. [Citations.] In *Bruner*, the Supreme Court concluded, ‘[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a “but for” cause of the earlier restraint.’ [Citation.] As noted previously, the burden is on the accused to establish entitlement to presentence custody credit. [Citations.]” (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1257-1258.)

Foster was on parole for assault on a police officer (§ 245, subd. (c)) when he committed the offenses underlying case No. CRF30143. On October 29, 2007, while Foster was in custody in that case, a parole hold was placed on him. On November 19, 2007, Foster signed an Optional Waiver form and received a 12-month parole term. In addition to his commission of the offenses underlying case No. CRF30143, Foster’s

parole was violated for several reasons including: 1) manufacturing amphetamine/methamphetamine; 2) failing to register pursuant to Health and Safety Code section 11590; 3) unauthorized possession of a knife with a blade exceeding two inches; and 4) use of amphetamine/methamphetamine. Therefore, since the criminal conduct underlying case No. CRF30143 was not the only reason why his parole was violated, Foster was not entitled to credit in that case for the year he spent in custody on his parole violation.

Moreover, the record indicates that in 2007 Foster did not get a probable cause hearing before his parole was revoked because he waived a hearing. Further, his claim that his defense counsel was ineffective for failing to file a motion to suppress is not cognizable on appeal because it relied on facts outside the record. (*In re Rogers* (1980) 28 Cal.3d 429, 437, fn. 6.)

Nevertheless, our review of the record disclosed the following errors relating to Foster's entitlement to presentence custody credit and postsentence actual custody credit.

On December 29, 2010, when the Tuolumne County Superior Court sentenced Foster in the three cases, in case No. CRF30143, the court awarded appellant 36 days of presentence custody credit consisting of 18 days of presentence actual custody credit and 18 days of presentence conduct credit. In case No. 1406232, the court merely reaffirmed the Stanislaus County Superior Court's original grant of 387 days of presentence custody credit consisting of 237 days of presentence actual custody credit and 150 days of presentence conduct credit.³

Prior to January 25, 2010, section 4019 provided that most inmates earned two days of conduct credit for every four days they served in actual custody. (Former section

³ The court did not award appellant any presentence custody credit in Tuolumne County case No. CRF32423.

4019, subds. (b) & (c), as amended by stats. 1982, ch. 1234, § 7, p. 4553.) From January 25, 2010, through September 27, 2010, section 4019 provided that certain inmates qualified for two-for-two conduct credit.⁴ (Former § 4019, subds. (b)(1) & (c)(1)), as amended by stats. 2009-2010, 3d Ex.Sess., ch. 28, § 50, p. 4428.) Effective September 28, 2010, former section 2933 provided that certain inmates who were sentenced to prison and whose sentence was executed were entitled to one-for-one conduct credit for each day they were in presentence custody. (Former § 2933, subd. (e)(1)), as amended by stats. 2010, ch. 426, § 1, p. 2087.)⁵

The more generous conduct credit provisions of sections 4019 and 2933, however, excluded certain inmates, including those who had a prior conviction for a serious felony. (Former § 4019, subds. (b)(2) & (c)(2), former § 2933, subd. (e)(3).) Foster was not eligible for the more generous conduct credit provisions under the former versions of sections 4019 or 2933 because his prior conviction for assault on a police officer (§ 245, subd. (c)) was a serious felony (§ 1192.7, subd. (c)(31)). Therefore, the Tuolumne County and Stanislaus County courts should have calculated appellant's presentence custody credit using section 4019's two-for-four formula.

Applying this formula to Foster's 237 days of presentence actual custody credit in case No. 1406232, it is clear that Foster was entitled to only 118 days, not 150 days, of presentence conduct credit ($237 \text{ days} \div 4 = 59.25 \text{ days}$; $2 \times 59 \text{ days} = 118 \text{ days}$). Thus, he was also entitled to only 355 days of presentence custody credit in that case ($237 \text{ days} + 118 \text{ days} = 355 \text{ days}$).

⁴ Section 4019 was amended effective September 28, 2010, to eliminate the two-for-two conduct credit that was available to some inmates. (Stats. 2010, ch. 426, § 2, p. 2088.)

⁵ Section 2933 was amended effective September 21, 2011, operative October 1, 2011, to eliminate the one-for-one conduct credit for inmates sentenced to prison whose sentences were executed. (Stats. 2011-2012, 1st Ex.Sess., ch. 12, § 16, pp. 5962-5963.)

Further, based on Foster's 18 days of presentence actual custody credit in case No. CRF30143, he was entitled to only 8 days of presentence conduct credit ($18 \text{ days} \div 4 = 4.5 \text{ days}$; $4 \text{ days} \times 2 = 8 \text{ days}$). Thus, in that case he was entitled to only 26 days of presentence custody credit ($18 \text{ days} + 8 \text{ days} = 26 \text{ days}$).

Moreover, the Tuolumne County court was required in case No. 1406232 to calculate the actual days appellant spent in custody from June 8, 2010, the day after he was sentenced in the Stanislaus County case, through December 29, 2010, the day he was sentenced in all three cases and to award these days to Foster in his abstract of judgment. (*People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012-1013.) The record, however, indicates that the 387 days appellant was awarded in case No. 1406232 did not include the 174 days Foster spent in custody from June 8, 2010, through December 29, 2010, and that these 174 days were not otherwise memorialized in Foster's abstract of judgment. In view of the foregoing, we will modify Foster's award of presentence custody credit in case Nos. CRF30143 and 1406232 as noted above and in case No. 1406232 award him postsentence actual custody credit through December 29, 2010, the day he was resentenced in case No. 1406232.

Further, following an independent review of the record we find that with the exception of the issues discussed above, no other reasonably arguable factual or legal issues exist.

DISPOSITION

Foster's award of presentence custody credit in case No. CRF30143 is modified from 36 days to 26 days consisting of 18 days of presentence actual custody credit and 8 days of presentence conduct credit. In case No. 1406232, his award of presentence actual custody credit is decreased from 387 days to 355 days consisting of 237 days of presentence actual custody credit and 118 days of presentence conduct credit. Foster is awarded 174 days of postsentence actual custody credit in case No. 1406232. The trial

court is directed to prepare an amended abstract of judgment that memorializes these amounts and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.